POINT III

The Act Undermines the Appellees' Seven Alleged Defenses.

In Point II.A of its brief, Verizon states that "The Board's Decision to Employ The Generic Proceeding in Lieu of the Non-Act Compliant Rates ... Was Consistent With, And, Indeed, Mandated By the Act." Verizon Brief at 32. In support, Verizon then offers various legal arguments. In this Part III we show that Verizon's arguments are wrong, because they either misapply the statutes or are not relevant. These errors leave unchanged Congress' express language delineating the scope of state commission action when approving or rejecting an arbitrated agreement under Section 252(e).

In addition to these errors, each argument shares a common defect: the assumption that the arbitrated rates are "Non-Act Compliant." As Point I demonstrated, the Board never found the rates non-Act compliant. The Board never reviewed rates, but instead applied its general policy of superseding all arbitrated rates with generic rates.

A. Appellees' Hope for "Broad Authority" in the Board to Supersede Rates Must Give Way to the Act's Specific Provisions

Verizon argues (at 32, 37) that the Board's "broad authority" under the Act "obligated" it to substitute generic rates for arbitrated rates. Verizon (at 32) also criticizes the Ratepayer Advocate's description of limits on the Board's authority under Section 252(e), as distinct from its authorities under Section

252(b-c), because they would "unduly limit the Board's flexibility."

Instead of reaching for the non-statutory phrases "broad authority" and "flexibility," Verizon should have addressed the statutory language, particularly Section 252(e)(1) which dictates that the Board "shall approve or reject the agreement, with written findings as to any deficiencies." It did not.

Inconvenienced by Section 252(e)(1), Verizon (at 36) turns to Section 252(b-c). But there are serious distinctions between these provisions. Section 252(b-c) deals with a state regulator's authority during arbitration. That authority is "broad[er]" than under Section 252(e). But Section 252(b-c) does not apply to this appeal because the arbitration in this case was completed before the Board required substitution of its generic rates.[17]

Verizon's argument (at 37) that the Board could mandate use of its generic rates under Section 252(b) because "[n]o agreement containing the arbitrated rates had ever been 'consummated' at the time of the Board's Generic Proceeding decision" is circular. There was no consummation because Verizon refused to sign the arbitrated agreement, and Verizon refused to sign because of the Board's ruling -- the ruling here on appeal -- that generic rates would supersede any arbitrated rates.

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[17] Moreover, Verizon's argument based on Section 252(b) authority is inconsistent with its contention that the Board superseded the arbitrated rates because it found them "non-Act compliant," since such a finding would have had to occur pursuant to Section 252(e).

Viewing Sections 252(e) and 252(b-c) as interchangeably, Verizon cites case law indiscriminately. Confusing cases involving review of an arbitrator's actions under Section 252(b-c), with those involving commission review of a completed arbitration agreement under Section 252(e), Verizon cites (at 37) U.S. West Commun., Inc. v. Hix, 57 F.Supp.2d 1112 (D. Colo. 1999). That case involved a review of state regulatory requirements instituted during arbitration. Thus the proposition for which Verizon cites it, the Board's "broad authority" in approving or rejecting an arbitrated agreement and the Board's "obligation" to supersede the arbitrated rates, does not apply here because it addresses the authorities and obligations of the arbitrator under Section 252 (b-c), not a state commission's review of a completed arbitration under Section 252(e).[11]

B. A Difference in the Size of the Record Does not Justify Substituting Generic for Arbitrated Rates

Verizon and the Board want to substitute generic for arbitrated rates for all time, merely because the record supporting the generic rates was larger than the one supporting the arbitrated rates. Verizon Brief at 33-36; Board Brief at 17-19. Similarly, Verizon attaches legal relevance (at 33) to the more "limited process" of the arbitration relative to the Generic Proceeding.

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[11] The Board's misgivings about its narrow authority under Section 252(e) cause it to attribute to the Ratepayer Advocate positions we never took. See, e.g., Board Brief at 15 (Ratepayer Advocate never said that the Board "is precluded from making judgments different from the assigned arbitrator"); id. at 17 (Ratepayer Advocate never said that "the Board is bound by judgments and rulings made by the arbitrators").

The relative size of the two records is not relevant to the Board's authority under Section 252(e). Indeed, section 252(b)(4)(B) requires the arbitrator to act "on the basis of the best information available"; nowhere does Section 252 authorize the Board to eliminate the rate arbitration process because a generic proceeding might produce more information.

Nor does the Ratepayer Advocate wish the Board to "ignore" the Generic Proceeding information, Verizon Brief at 36, Board Brief at 22, and "passively approve" the arbitrator's decision. Id. at 22. Certainly the Board must consider all relevant information when deciding whether to "approve or reject" an arbitrated agreement. What the Board may do with that information is the issue. The Board may "only approve or reject the agreement, with findings as to any deficiencies," Section 252(e)(1); the Board may not use the information to supersede arbitrated rates with generic rates.

C. A Theoretical Ability to "Negotiate" Cannot Save the Board's Action

Both Verizon and the Board argue that the availability of negotiations leaves carriers unharmed by its decision. See Verizon Brief at 51, 54; Board Brief at 15, 25. This argument fails. An action which violates one statutory right (the right to rate arbitrations under Section 252(b)) does not become lawful because it preserves another statutory right (the right to negotiations under Section 252(a)).

Moreover, the Board's decision hardly leaves the statutory right to negotiation unimpaired. Arbitration is the stick that

makes negotiation successful. See Section 252(b)(1)(providing that, after unsuccessful negotiations, any party "may petition a State commission to arbitrate any open issues"); Iowa Util. Bd. v. FCC, 120 F.2d 753, 800 (8th Cir. 1997)(observing that "state-run arbitrations ... act as a backstop or impasse-resolving mechanism for failed negotiations"). By imposing generic rates, the Board has eliminated carriers' practical ability to negotiate for different rates. As the District Court observed (opinion at 25, [30a]), under the Board's generic rate policy, an incumbent carrier "may simply refuse to negotiate or sign any arbitrated agreement [as Verizon did in this case] and be guaranteed the generic rates as a fallback or floor."

D. The Complete Substitution of Generic for Arbitrated Rates is not a "Rejection" of Rates with an "Indication" of What New Rates "Could Be"

Citing U.S. West Comm., Inc. v. Garvey, 1999 U.S. Dist. LEXIS 22042 (D. Minn. March 30, 1999)(mem. op.), Verizon argues that even if the statute limits the Board to accepting or rejecting the arbitrator's rates, the Board's decision "was, in effect, a rejection of the AT&T arbitration agreement with an indication of the terms that could be included to meet the Board's approval requirement." (Verizon Brief at 38.)

Verizon has moved from fact-stretching to fact-creating. The Board did not "reject" the arbitrated rates. See Point I.B. The Board instead required substitution of the generic rates. AT&T had

no option to renegotiate or rearbitrate new rates.[14] Verizon's "could be" implies that AT&T had a choice; but the Board's decision negated any such choice.

Thus Garvey does not apply. After hearing, the state commission there found that the arbitrated agreements did not comply with the Act, and then "took the additional step of informing the parties as to the specific deficiencies and how they could be cured." Id. at *96. The court found the parties had no obligation to use the language. Further, unlike the District Court in this case, the Garvey court specifically addressed modification in light of the "approve or reject" language of Section 252(e)(1) and found that the state commission's action was not a "unilateral modification" of the arbitration agreement. 1999 U.S. Dist. Lexis at *96. "Unilateral modification" of the arbitration agreement is exactly what the Board did here.

E. Section 252 of the Act Does Not Allow States to Supplant Federal Statutory Standards In Order to Establish Uniformity and Consistency in Interconnection Rates

The Ratepayer Advocate's initial brief argued that the uniformity imposed by the Board's decision violated the Act. Verizon responds that "although the Board's order did not mandate uniform rates, the Act itself underscores the possibility of uniform statewide rates." (Verizon Brief at 48) Verizon also asserts (at 25) that "numerous State commission have adopted

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[14] See, e.g., Generic Order at 224 (126a)("[T]he generic rates are controlling and must supersede arbitrated rates")(emphasis added).

uniform interconnection rates by way of generic cost proceedings or consolidation of the cost/rate portions of these proceedings."[25]

That the Act makes possible some uniformity is a non sequitor. Congress' scheme for local competition does allow for the possibility of some consistency in rates, see Section 252(d)(non-discrimination requirement); Section 252(i)(providing that carriers may pick and choose provisions, including rates, from other carriers' agreements). But those provisions do not authorize state commissions to exact uniformity through mandatory methods like the substitution of generic for arbitrated rates. Moreover, while other states may have engaged in generic cost proceedings, Verizon has not cited a replica of this case, where a state commission mandated generic rates to supersede arbitrated rates.

Finally, Verizon relies heavily on consolidated arbitrations, but they are also irrelevant. After passage of the Act, many carriers initially filed many arbitrations at about the same time, thereby permitting efficient consolidation. Consolidation naturally led to some rate consistency. As time goes on, however, and new petitions for arbitration are filed, there will be fewer opportunities for consolidation, and less resulting consistency. Section 252(g), cited by Verizon, is only a procedural mechanism to permit efficient regulatory action, not a license to mandate use of one set of rates.

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[25] See also Board Brief at 19 n.6 (suggesting that Section 252(g) on consolidation of arbitrations is "instructive and supportive with regard to the Board taking into account its generic proceeding rulings in connection with an arbitration.").

F. No Court Has Held that Section 252(e) Provides State Regulators Authority to Modify Agreements

Verizon (at 40-43) relies on GTE North, Inc. v. McCarty, 978 F.Supp 827 (N.D. Ind. 1997) for its proposition that Section 252(e) provides states "broad authority" to mandate modifications to arbitrated agreements.

McCarty addressed only one issue: whether a federal district court could exercise jurisdiction under Section 252(e)(6) when it was undisputed that the regulator had "not approved or rejected an interconnection agreement pursuant to sec. 252(e)." 978 F.Supp. at 832. That issue is not relevant here. Further, the McCarty court's dicta quoted in Verizon's brief (at 40) -- noting a state commission may "reconsider the substance of a previous arbitration order when reviewing a final agreement" -- stands only for the obvious proposition that state commissions must analyze the substance of a final arbitration agreement for compliance with the requirements of Section 252(e)(2)(B).

Verizon's related arguments (at 41-42), that several state commissions have modified agreements and that carriers "have frequently requested modifications of arbitrated determinations," is also flawed. That parties have asked state regulators for modifications has no bearing on the legality of the Board's mandate that arbitrated rates be superseded with generic rates. Moreover, Verizon cites only state commission decisions making a casual reference to "approval with minor modifications," or a similar statement, in describing procedural history. Given the lack of

information regarding how those "minor modifications" were made and the substance of those modifications, these cases provide no authority for Verizon's proposition.

G. Expediency Cannot Trump Clear Statutory Language

Verizon argues (at 33) that the Ratepayer Advocate "ignores the District Court's well-reasoned finding that the Board's July 1997 decision to substitute generic rates ..., although coming after the statutory period for resolving arbitrations ... was entirely consistent with the Act's goal to 'ensure[] that interconnection issues will be resolved expeditiously' in order to 'jumpstart competition.'"

The timing of the Board's decision is a non-issue in this appeal. Unlike AT&T, the Ratepayer Advocate has not argued that the Board's action is invalid because it occurred after the 9-month statutory time frame of Section 252(b)(4)(C). Verizon's quotation of the District Court's opinion addresses AT&T's argument and not the legal validity of a state regulator's decision to mandate the superseding of arbitrated rates. Further, Congress's goal of providing for expeditious arbitrations cannot override the specific statutory provisions governing the arbitrations themselves.

Conclusion

In this case, the Ratepayer Advocate has challenged a Board decision which deters competing local exchange carriers from bringing their lower costs and diverse products to New Jersey in violation of Section 252 of the Act.

For the foregoing reasons, the Ratepayer Advocate respectfully urges the Court to reverse the determination of the District Court affirming the authority of the Board to supersede arbitrated interconnection rates with the Board's generic rates together with any other relief which the Court deems necessary and appropriate.

Respectfully submitted,

Blossom A. Peretz

Blossom A. Peretz, Esq.
Ratepayer Advocate

Dated: January 22, 2001

On the Brief
Heikki Leesment, Esq., DRA
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CERTIFICATE OF COMPLIANCE

Pursuant to the Rules of Appellate Procedure, Rule 32(a)(7)(C), the undersigned certifies that this brief contains 8,498 words in compliance with the enlargement of the word limitation granted by the Clerk of the Court on January 5, 2001. This certificate was prepared in reliance on the word count of the word-processing system used to prepare this brief.

Blossom A. Peretz, Esq.

Dated: January 22, 2001

Exhibit A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-3833

Southwestern Bell Telephone Company, Appellant, v. Missouri Public Service Commission; Sheila A. Lumpe; M. Dianne Drainer, Vice-Chair; Harold Crumpton, Commissioner; Robert Schemenauer, Commissioner; Connie Murray, Commissioner, all the above parties in their official capacities as commissioners of the Missouri Public Service Commission; AT&T Communications of the Southwest, Inc., Appellees.	*	Appeals from the United States District Court for the Western District of Missouri.

No. 99-3908

Southwestern Bell Telephone Company, Appellant,	*	

v. *
*
Missouri Public Service *
Commission; Sheila A. Lumpe; *
M. Dianne Drainer, Vice-Chair; *
Harold Crumpton, Commissioner; *
Connie Murray, Commissioner, all the *
above parties in their official *
capacities as commissioners of the *
Missouri Public Service Commission; *
AT&T Communications of the *
Southwest, Inc., *
*
Appellees. *

Submitted: May 8, 2000
Filed: January 8, 2001

Before RICHARD S. ARNOLD and BOWMAN, Circuit Judges, and MAGNUSON,[1] District Judge.

BOWMAN, Circuit Judge.

Southwestern Bell Telephone Co. (SWBT) appeals from the order of the District Court affirming in part and remanding in part orders of the Missouri Public Service Commission (PSC). In light of recent developments in the law, we remand to the District Court with instructions.

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[1]The Honorable Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

I.

This case arises under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.),[2] which was enacted to increase competition in the provision of telecommunications services. Under the Act, an incumbent local exchange carrier (LEC)[3] is obligated "to share its network with competitors." AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999) (citing 47 U.S.C. § 251(c) (Supp. II 1994)). The prospective competitor and the incumbent LEC "may negotiate and enter into a binding agreement . . . without regard to the" obligations imposed by certain sections of the Act. 47 U.S.C. § 252(a)(1). For example, the parties may agree to rates or terms that would not otherwise comply with the law or be required under the Act, as long as the state commission ultimately approves. "But if private negotiation fails, either party can petition the state commission that regulates local phone service to arbitrate open issues, which arbitration is subject to § 251 and the FCC regulations promulgated thereunder." AT&T Corp., 525 U.S. at 373.

Here, AT&T sought access to incumbent LEC SWBT's network for the purpose of providing local telephone service in Missouri, and the parties entered into negotiations. Unable to reach agreement on all of the terms and conditions, AT&T sought PSC arbitration as provided for in 47 U.S.C. § 252(b). There were two arbitrations, the second of which was preceded by a mediation conducted by the PSC's

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[2]Unless otherwise indicated, all references in this opinion to sections and subsections of the Telecommunications Act of 1996 are to Supp. IV (1998) of the United States Code. All references to the Code of Federal Regulations (C.F.R.) are to the most recent available version, the 1999 edition.

[3]LECs provide local telephone service or offer local access for long-distance service. 47 U.S.C. § 153(16), (26), (47). Incumbent LECs are those that were providing local phone service to an area on the effective date of the Act. Id. § 251(h)(1).

general counsel acting as a special master. The PSC approved a final agreement on March 19, 1998.

SWBT sought review in the District Court. See 47 U.S.C. § 252(e)(6) (conferring federal court jurisdiction for aggrieved party to challenge state commission determination as violation of Act). The court affirmed in part and reversed and remanded in part. AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co., 86 F. Supp. 2d 932 (W.D. Mo. 1999) (consolidated cases). SWBT appeals to this Court, challenging (1) the process employed by the PSC, (2) two of the PSC's pricing decisions, and (3) a PSC decision regarding combined network elements. We address the pricing decisions first.

II.

After the passage of the Telecommunications Act of 1996, the Federal Communications Commission (FCC), as charged by Congress in the Act, promulgated rules to implement the part of the Act at issue in this case. See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499 (1996) (First Report and Order). The PSC's pricing decision that is challenged here was made by reference to the FCC's chosen method of cost-based pricing. The FCC's method is known by its acronym, TELRIC, which stands for total element long run incremental cost. TELRIC provides a basis for determining the prices that will be charged for the interconnection and network elements that incumbent LECs are required to make available to potential competitors. In its First Report and Order, the FCC adopted TELRIC as a "forward-looking, cost-based pricing standard." Id. at 15844, ¶ 673. As described in 47 C.F.R. § 51.505(b)(1), the FCC determined that the TELRIC of an element (and therefore the price an incumbent LEC may charge a potential competitor for that element) "should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire

centers." After reviewing a direct challenge to § 51.505(b)(1), however, this Court recently vacated the FCC's pricing methodology:

> At bottom . . . , Congress has made it clear that it is the cost of providing the actual facilities and equipment that will be used by the competitor (and not some state of the art presently available technology ideally configured but neither deployed by the ILEC nor to be used by the competitor) which must be ascertained and determined.

Iowa Utils. Bd. v. FCC, 219 F.3d 744, 751 (8th Cir. 2000) (Iowa Utils. II).[4]

Here, it is clear that price—the amount that may be charged for the network access AT&T seeks from SWBT—is the overarching focus of the § 252 agreement between the parties, and we do not believe that the pricing decisions therein are severable from the rest of the agreement. We therefore conclude that the holding in Iowa Utilities II invalidating the TELRIC pricing methodology requires that the entire arbitrated agreement approved by the PSC in this case be vacated and that further

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[4]Legal challenges to the rules promulgated in the FCC's First Report and Order, and they are legion, have been consolidated in the Eighth Circuit. Iowa Utils. Bd. v. FCC, 120 F.3d 753, 792 (8th Cir. 1997) (Iowa Utils. I). Our decision last summer in Iowa Utilities II resulted from the Supreme Court's remand of our decision in Iowa Utilities I. See AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999). The Supreme Court in AT&T Corp. specifically noted that it was not addressing the TELRIC methodology question (subsequently decided by the Eighth Circuit in Iowa Utilities II). Id. at 374 n.3.

We also should note that, after the opinion in Iowa Utilities II was filed on July 18, 2000, the panel granted the FCC's motion to stay the mandate on that part of the decision that vacated 47 C.F.R. § 51.505(b)(1), pending the filing and disposition of petitions for writ of certiorari in the Supreme Court. In October 2000, a number of such petitions were filed, and as this opinion is written those petitions remain pending in the Supreme Court. Notwithstanding this turn of events, our decision in Iowa Utilities II is not vacated, remains the law, and requires vacatur of the § 252 agreement reached in this case.

proceedings (assuming AT&T still wants access to SWBT's network in Missouri) be held. Any such proceedings should employ a pricing methodology that is consistent with the 1996 Act as interpreted by this Court.

SWBT further argues that, "[e]ven if it were permissible to set prices based on the forward-looking costs of an idealized network, the PSC arbitrarily reduced Southwestern Bell's NRCs [nonrecurring costs] for unbundled network elements to a level below even those contemplated by a super-efficient hypothetical network." Br. of Appellant at 56. Because we hold, in keeping with this Court's decision in Iowa Utilities II, that it was not permissible for the PSC "to set prices based on the forward-looking costs of an idealized network," and because we are remanding for further proceedings that will involve new calculations, we do not address the nonrecurring costs issue SWBT raises.

III.

Given that this case was not the proper vehicle for a collateral challenge to the FCC's rulemaking (that is, to the TELRIC methodology per se), but instead presented only a challenge to the PSC's application of FCC rules to the facts of the case, the TELRIC pricing issue on which we decide the case merited only fleeting mention in the briefs, and appropriately so. The bulk of SWBT's argument for remand was dedicated to challenging the process afforded SWBT (and AT&T, for that matter) during the proceedings before the PSC. As we have said, the pricing methodology employed by the PSC in this case pursuant to rules promulgated by the FCC is not valid under the Act, and thus the § 252 agreement must be vacated. On remand, negotiations between the parties, and PSC arbitration as necessary, will begin anew, and so the process afforded SWBT in the initial PSC proceeding is now of no consequence. Accordingly, we decline to address the constitutional due process arguments raised by SWBT. Without deciding the question, however, we nevertheless note that there appear to be at least potential due process problems inherent in the procedure employed by the

PSC.[5] In any future § 252 arbitrations that become necessary in this case, or in any other such case that may come before the PSC, we caution the PSC to be more circumspect in the process it employs, with particular attention to excessive reliance on staff reports, especially those reports compiled after unnecessary ex parte discussions with parties. If the PSC fails to do so, the next aggrieved party to appear in federal court on a matter such as this may well be able to demonstrate that the procedures employed (which, incidently, were vehemently objected to by AT&T as well as SWBT at the time of the arbitrations) either were inherently lacking in due process or resulted in prejudice to the aggrieved party, requiring vacatur of the results of the proceedings.

IV.

Finally, SWBT complains that its agreement with a particular negotiated provision, an agreement made only to comply with an FCC rule later determined to be invalid under the Act, did not constitute a waiver of its right to challenge the negotiated provision in federal court. Both the PSC and the District Court determined that the agreement was voluntary and enforceable.

In Iowa Utilities I, this Court vacated 47 C.F.R. § 51.315(c)-(f). 120 F.3d at 813. Those subsections required incumbent LECs to combine network elements as requested by a potential competitor and as technically feasible "in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network." 47

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[5]The District Court found that SWBT was not prejudiced by the alleged irregularities (which are fully set forth in that court's opinion) and therefore declined to invalidate the PSC proceedings and the results of those proceedings. AT&T Communications, 86 F. Supp. 2d at 951-55. The court also concluded that the PSC procedures were neither arbitrary and capricious, nor in violation of any state statutes or regulations that might be applicable to state commission arbitrations held pursuant to 47 U.S.C. § 252. Id. at 955-58.

C.F.R. § 51.315(c). The Supreme Court in AT&T Corp. did not disturb our holding that the rules must be vacated, and we reaffirmed our conclusion in Iowa Utilities II. 219 F.3d at 759 ("We are convinced that rules 51.315(c)-(f) must remain vacated.").

Our opinion in Iowa Utilities I was filed on July 18, 1997, at which time all were on notice that the combination rules of 47 C.F.R. § 51.315(c)-(f) were contrary to the Act. By the end of the month, the PSC issued its final arbitration order in this case.[6] On August 20, 1997, SWBT filed a Motion for Clarification, Modification and Application for Rehearing of Final Arbitration Order. That motion cited Iowa Utilities I, but not in reference to the vacatur of § 51.315(c)-(f). On October 10, 1997, nearly two months later, the parties filed an interconnection agreement (we use the term loosely, as such agreement incorporated the PSC's arbitration orders) for PSC approval. According to the terms of the agreement, SWBT was to provide combinations of network elements as requested by AT&T whether or not such elements were combined in SWBT's existing network, notwithstanding that this Court had invalidated the FCC's rules so requiring almost three months earlier. SWBT filed a Notice of Clarification Concerning Pending Interconnection Agreement on October 30, 1997, and for the first time advised the PSC of the Iowa Utilities I decision regarding the rules set forth in § 51.315(c)-(f). The PSC approved the October 10 interconnection agreement on November 5, 1997, and later rejected the § 51.315(c)-(f) argument presented in SWBT's Notice of Clarification. The District Court, in its review, concluded that SWBT voluntarily agreed to combine unbundled elements *after* we had vacated the FCC's rules requiring incumbent LECs to do so and therefore the PSC "properly required SWBT to abide by its contractual agreement." AT&T Communications, 86 F. Supp. 2d at 958.

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[6]According to SWBT, the determination that SWBT would combine network elements for AT&T was resolved in the voluntary negotiations that took place before arbitration. Br. of Appellant at 61 ("The negotiations preceding the arbitration were conducted under the FCC mandate to combine elements, and the only matters presented for arbitration involved the prices at which the network elements would be offered.").

SWBT now claims that the § 51.315(c)-(f) rules remained binding throughout the arbitration process, so "Southwestern Bell was legally required to offer network element combinations." Br. of Appellant at 61 (emphasis omitted). Therefore, phrasing the issue in terms of waiver, SWBT asserts there was no voluntary and intentional relinquishment of a known right but merely acquiescence in the law. According to SWBT, "the PSC consistently required Southwestern Bell to comply with unlawful combination provisions." Id. at 65.[7]

Although the timing of the relevant decisions, agreements, and motions points to the conclusion that SWBT voluntarily agreed to combine unbundled network elements for AT&T, even though the law did not so require when SWBT executed the agreement, this is another question we need not reach.[8] As we have said, the October

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[7]As we have said, under the Act an agreement that is entered into "without regard" to the obligations as set forth in 47 U.S.C. § 251(b) and (c) nevertheless will be enforceable (if approved by the state commission) if it is the product of voluntary negotiations. 47 U.S.C. § 252(a)(1). In other words, if SWBT *voluntarily* (knowledge of the law assumed) agreed to take an action that was not an "obligation" under the Act, there would be no grounds for vacating the agreement as a violation of the Act. Although combining unbundled network elements is not now required by law, it is not forbidden by law.

[8]Substantially similar cases go both ways on this question (and none is binding authority in this Circuit in any event.) Compare US W. Communications, Inc. v. Hix, 93 F. Supp. 2d 1115, 1126 (D. Colo. 2000) (finding jurisdiction to review claim where party raised issue with state commission as soon as Iowa Utilities I was decided, "[i]n other words . . . as soon as practicable after the law substantially changed on this issue") and MCI Telecomms. Corp. v. US W. Communications Inc., No. C97-1508R, 1998 U.S. Dist. LEXIS 21585, at *8 (W.D. Wash. July 21, 1998) (concluding no waiver because arbitrator applied regulation that had been "repudiated"), aff'd in part, rev'd and remanded in part on other grounds, 204 F.3d 1262 (9th Cir.), cert. denied, 121 S. Ct. 504 (2000) and AT&T Communications of the S. States, Inc. v. BellSouth Telecomms., Inc., 7 F. Supp. 2d 661, 670 (E.D.N.C. 1998) (striking paragraph in agreement where, "[a]t the time of the Agreement, BellSouth was merely adhering to

10, 1997, agreement between SWBT and AT&T must be vacated, and there will be new negotiations or arbitrations (as necessary) under a revamped pricing standard, presumably leading to a totally new agreement. Therefore the issue of whether SWBT voluntarily agreed to combine unbundled network elements in the October 10 agreement, when the law did not so require, is moot.

V.

To sum up, we reverse the District Court on the question of TELRIC pricing and remand with instructions to remand to the PSC for further proceedings not inconsistent with this opinion. The network sharing agreement of October 10, 1997, between SWBT and AT&T is vacated. Any new agreement reached with the aid of arbitration by the PSC shall be the result of proceedings that are not offensive to the requirements of procedural due process and shall employ a pricing methodology that is consistent with the Act. The procedural due process challenge raised here is moot and therefore we do not decide the issue. We likewise hold that any question regarding the validity of SWBT's agreement to combine network elements not combined in its own system is moot, inasmuch as the agreement is vacated and will now be subject to renegotiations. Thus, we do not address that question either.

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established FCC rules that § 251(c)(3) compels an ILEC to combine purchased network elements"), remanded, 229 F.3d 457 (4th Cir. 2000) (agreeing challenge to agreement was cognizable but remanding for review by district court in first instance of paragraph at issue on the merits in light of changes in law); with U S W. Communications, Inc. v. Worldcom Techs., Inc., 31 F. Supp. 2d 819, 826 (D. Or. 1998) (finding no waiver of challenge to agreement to recombine unbundled elements without discussing fact that agreement was executed more than a month after Iowa Utilities I was filed).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Exhibit B

of Public Utilities and the President thereof; the New Jersey Board of Public Utilities was reconstituted in, but not of, the Department of Treasury; certain personnel and functions of the Department of Environmental Protection were transferred to the Board of Public Utilities and a division of the Ratepayer Advocate was created within the Board of Public Utilities by Reorganization Plan No. 001-1994, set out under § 13:1D–1.

A PLAN FOR THE REORGANIZATION OF THE BOARD OF REGULATORY COMMISSIONERS WITHIN THE DEPARTMENT OF TREASURY, THE REDESIGNATION OF THE BOARD OF REGULATORY COMMISSIONERS AS THE BOARD OF PUBLIC UTILITIES, THE REDESIGNATION OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY AS THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND THE REFORM OF THE FUNCTION OF RATE COUNSEL

GENERAL STATEMENT OF PURPOSE

The safe, efficient, and economical provision of utility services to the citizens of New Jersey has long been of paramount concern. To promote the coherent development of utility policy, then-Governor Woodrow Wilson established the Board of Public Utility Commissioners in 1911. Over the years, the Board has regulated such essential services as the provision of electricity, natural gas, telephone, water, sewerage, and, most recently, cable television.

Perhaps because the function it serves is sensitive to evolving technologies and the social concerns they raise, the Board has undergone numerous reorganizations. In 1977, reflecting public concerns over energy issues, the Board of Public Utility Commissioners was subsumed in, but not of, the newly formed Department of Energy. In 1987, the Department of Energy was abolished, and the Board was transferred to the Department of Treasury. Finally, in 1991, reflecting public concern over environmental issues, the Board was subsumed within the Department of Environmental Protection and Energy.

The proper mandate of the Board of Regulatory Commissioners, however, is far broader than its inclusion within the Department of Environmental Protection and Energy suggests. Pursuant to its statutory authority, it is the duty of the BRC to regulate the public utilities of the State for the provision of safe, adequate and proper service, including electric, gas, water and sewer, and telecommunications. In addition, the BRC has regulatory oversight of the cable television industry. Thus, the Board is charged with regulating in many contexts, not merely within the context of environmental protection. It is time that the historic and prospective importance of the regulation of the energy and other utilities be reflected within the structure of the agency.

The purpose of this Plan is to create a governmental structure that will promote the statutory aims of the BRC. Pursuant to its mandate, the BRC regularly considers matters regarding economic regulation and interacts with the Division of Rate Counsel, which has been within the Department of the Public Advocate. Beyond economic considerations, the BRC is also responsible for seeing that the energy needs of New Jersey's citizens and industry are met. Accordingly, the BRC is inextricably involved with the planning and implementation of the present and future energy policies of the State.

The Plan puts into place a structure that will coordinate energy planning and promote the efficient regulation of energy costs, thus enhancing the State's economic growth and prosperity. The Plan restores the BRC to its former status in, but not of, the Department of Treasury and renames the BRC the New Jersey Board of Public Utilities. It proposes the reinstatement of the President of the BPU to cabinet-level status, establishes within the BPU a Division of the Ratepayer Advocate, and realigns the BPU to better address